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State of Utah v. Kendall Rosell Swenson : Brief of Appellee

Utah Court of Appeals

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Case No. 20080243-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

KENDALL ROSELL SWENSON,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions on two counts of burglary, two counts of criminal mischief, one count of theft, two counts of theft by receiving stolen property, and one count of manufacturing or possessing burglary tools, in the First Judicial District Court of Utah, Cache County, the Honorable Gordon J. Low presiding.

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UTAH COURT OF APPEALS

State of Utah,
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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of burglary, two counts of criminal mischief, one count of theft, two counts of theft by receiving stolen property, and one count of manufacturing or possessing burglary tools. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2008).

STATEMENT OF THE ISSUES

1. Defendant appealed the judgment in this case, and this Court held that it lacked jurisdiction because the appeal was untimely. Following that decision, the trial court entered an amended judgment to correct an inadvertent error in the original judgment. Did the amended judgment restart defendant's time for filing an appeal from his convictions?

Standard of Review. No standard of review applies to this issue.

2. Did the trial court err when it denied defendant's motion to dismiss for alleged violations of the Interstate Agreement on Detainers?

Standard of Review. "A trial court's ruling on a motion to dismiss is a question of law which [this Court] review[s] for correctness giving no particular deference to the trial court's legal conclusions." *State v. Krueger*, 1999 UT App 54, ¶ 10, 975 P.2d 489.

3. Did the trial court err when it denied defendant's motion to suppress?

Standard of Review. A trial court's decision to grant or deny a motion to suppress is a mixed question of law and fact. The trial court's legal conclusions are reviewed non-deferentially for correctness, *State v. Brake*, 2004 UT 95, ¶¶ 11, 15, 103 P.3d 699, and its underlying factual findings are reviewed for clear error, *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant provisions are reproduced in **Addendum A**:

U.S. Const. amend. IV
Utah Code Ann. § 77-29-5 (West 2004)
Utah R. App. P. 4(a)
Utah R. Crim. P. 30
Utah R. Crim. P. 22(e)

STATEMENT OF THE CASE

Defendant was charged with possession or use of a controlled substance, burglary, criminal mischief, possession of drug paraphernalia, theft, theft by receiving stolen property, and unlawful possession of burglary tools. R1-3. Defendant filed several motions, including a motion to dismiss for alleged violations of the Interstate Agreement on Detainers and a motion to suppress evidence found in defendant's vehicle. R94, 99. The trial court denied those motions. R349:7, 49; *see also* R350:87-89. The trial court conducted a jury trial, and the jury returned verdicts finding defendant guilty on eight of ten counts. R237-240. On count 8, the jury found defendant guilty of theft by receiving stolen property, a class B misdemeanor. R237-39 (jury verdict) (reproduced in **Addendum B**).

On March 14, 2007, the court entered judgment, sentencing defendant to six concurrent indeterminate terms of zero to five years on six convictions for third degree felonies and to two concurrent jail terms on two misdemeanor convictions. R320. In so doing, the court listed defendant's two convictions of theft by receiving stolen property, counts 8 and 9, as third degree felonies, R320, where the verdict form listed count 9 as a third degree felony but count 8 as only a class B misdemeanor. R238.

On March 11, 2008, almost one year later, defendant filed his notice of appeal. R376.

STATEMENT OF FACTS

Just before midnight on August 16, 2006, police officer Brad Hansen, responded to a burglary alarm at the Logan Top Spot convenience store. Upon arriving, he encountered defendant in the store's parking lot. R349:14-16, 18. Defendant was running from the northwest door and said that he was jogging. R349:17. Officer Hansen, aware of many false alarms, allowed defendant to continue on his way. R349:16.

Almost immediately, however, Officer Hansen discovered burglary tools near the northwest door of the store and found that the door's lock had been popped. R349:16-18. He looked around for defendant and saw that defendant had climbed into the cab of a semi-truck parked in the car wash lot just east of the Top Spot. R349:18, 36. Officer Hansen approached the truck, and defendant jumped out, saying, "I didn't do it. I didn't do it." R349:19.

Back-up arrived, and Officer Hansen left defendant with Officer Ostermiller. R349:20. Officer Ostermiller began getting defendant's information and ran a warrants check. R349:20, 22.

Officer Hansen and a second back-up officer returned to the Top Spot, seeking additional evidence. R349:20. Officer Hansen walked over to the truck, stepped up onto the driver's door area, and looked in through the open driver's

window. R349:20. He saw miscellaneous tools in the passenger cab, including a gas-powered chop saw. R349:20-22.

Officer Hansen then returned to defendant, telling him that he was being detained for a possible burglary. R349:22. At that point, Officer Ostermiller told Officer Hansen that he had located an outstanding warrant for defendant's arrest. R349:22. The officers arrested defendant and transported him to the police department. R349:22-23.

Prior to impounding the truck, police performed an inventory search. R349:36-37. Burglary tools were found in the cab of defendant's truck, as was evidence of criminal activity at other locations. R349:37-40. Additional facts are set forth in the portion of the brief addressing defendant's challenge to the denial of his motion to suppress. *See* Point III, below.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to hear defendant's appeal. The trial court entered judgment on March 14, 2007. Defendant filed his first notice of appeal on April 20, 2007. In an earlier case, this Court held that defendant's notice of appeal was not timely. Moreover, this Court also held that a July 30, 2007 addendum to the judgment did not restart the time for filing a notice of appeal.

On February 12, 2008, the district court filed an amended judgment. The amended judgment corrected a clerical error and an illegal sentence. It did not, however, restart the time for filing an appeal.

2. The trial court properly denied defendant's motion to dismiss for an alleged violation of the Interstate Agreement on Detainers. The Interstate Agreement on Detainers, which provides rules "to encourage the expeditious and orderly disposition of . . . charges [outstanding in one jurisdiction against a defendant imprisoned in another jurisdiction]" did not apply to any matter in this case. Defendant was not detained on the basis of outstanding charges in another jurisdiction.

3. The trial court properly denied defendant's motion to suppress. Assuming that defendant was subject to a search governed by the Fourth Amendment, the search was permissible under the automobile exception to the warrant requirement. Evidence discovered was also admissible because defendant's arrest on an outstanding warrant provided an independent lawful basis for a post-arrest truck search. His arrest provided grounds for a lawful search incident to arrest, and the need to impound his vehicle provided grounds for a lawful inventory search.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION AND MUST DISMISS THIS APPEAL BECAUSE THE NOTICE OF APPEAL WAS NOT TIMELY

Defendant did not timely file his notice of appeal, and this Court therefore lacks jurisdiction to hear it.

Proceedings below. Defendant filed three notices of appeal in this case. He filed notices of appeal from the judgment, from an addendum to the judgment, and from an amended judgment.

Judgment. On March 14, 2007, the trial court entered its judgment. R319 (reproduced in **Addendum C**). In listing the charges and convictions in the final judgment and sentence, the trial court correctly recorded that the jury had found defendant guilty on count 8, theft by receiving stolen property, but erroneously recorded it as a third degree felony rather than as a class B misdemeanor. *Compare* R238 *with* R319. The court therefore imposed the statutory indeterminate term for a third degree felony, rather than the term for a class B misdemeanor. R320.

Defendant filed an untimely pro se notice of appeal from this judgment on April 20, 2007. R327.

Addendum to judgment. On July 30, 2007, the trial court entered an "addendum to sentence, judgment, commitment." R344 (reproduced in **Addendum**

D). The addendum noted that "[t]he Defendant has a pending Federal case, or is on Federal Parole any details of which this Court is uninformed." R344. The addendum stated that "[t]his Court had at the time of sentencing expressed the intention that this sentence is to run concurrent with any Federal cou[n]t. This Order is in clarification that the state's case is not to run consecutive to any proceedings by the Federal authorities and that this sentence can be served concurrent at any applicable Federal institution or the Utah State Prison." R345.

On August 15, 2007, defendant filed an amended notice of appeal, appealing from the order entered on July 30, 2007. R347.

Dismissal of appeal. On November 1, 2007, this Court dismissed defendant's appeal for lack of jurisdiction. *See State v. Swenson (Swenson I)*, 2007 UT App 359U (reproduced in **Addendum E**). The Court reasoned that defendant had only thirty days after the entry of the March 14, 2007 judgment within which to appeal. *Id.* The Court noted that defendant had filed his notice of appeal on April 20, 2007, thirty-seven days after the entry of his sentence and outside the time to appeal. *Id.*

This Court also addressed defendant's argument that the July 30, 2007 addendum to his sentence re-started the time for his appeal and that his second notice of appeal was therefore timely. *Id.* This Court held that the addendum did not constitute a material change in the judgment, but merely clarified the substance of the judgment, and therefore did not enlarge the time for appeal. *Id.*

Amended judgment. On February 12, 2008, following remittitur, the trial court entered "amended minutes—sentence, judgment, commitment." R370-73 (reproduced in **Addendum F**); *see also* R370-71 ("minutes— in court note"). The amended judgment had only two changes. First, the amended judgment listed the conviction on count 8, theft by receiving stolen property, as a class B misdemeanor. R372. Thus, the court corrected the mistake inadvertently included in the original judgment, which listed count 8 as a third degree felony even though the verdict form listed it as a class B misdemeanor. Second, the amended judgment reduced the fine and surcharge on the conviction from the maximum allowable amount for a third degree felony to the maximum allowable amount for a class B misdemeanor. *See* R375; *see also* Utah Code Ann. § 51-9-401 (West Supp. 2008) (surcharges); Utah Code Ann. § 76-3-203 (West 2004) (indeterminate terms for felony convictions); Utah Code Ann. § 76-3-204 (West 2004) (terms for misdemeanor convictions); Utah Code Ann. § 76-3-301 (West 2004) (fines); Utah Code Ann. § 78A-2-601 (West Supp. 2008) (security surcharge).

These were the only changes. The court simply copied the original judgment, made the two changes, and signed the amended minutes on February 12, 2008. *See* R372-75.

Defendant filed "a notice of appeal of his sentence, judgment and conviction" on March 11, 2008. R376. He apparently relies on that notice of

appeal in invoking the court's jurisdiction to review the claims he now brings on appeal. *See id.* His appeal, however, does not assert that the trial court erred in amending the judgment. Rather, defendant attacks his conviction, claiming that the trial court erred in its October 2006 pretrial rulings. *See* Br. Appellant at 8-21.

Relevant law. A notice of appeal must be filed within 30 days of the entry of final judgment. *See* Utah R. App. P. 4(a). In a criminal case, the entry of a sentence constitutes the final order. *See State v. Bowers*, 2002 UT 100, ¶ 4, 57 P.2d 1065. Thus, "the [thirty]-day period for filing [a] notice of appeal in a criminal case . . . is jurisdictional and cannot be enlarged by [the appellate] [c]ourt." *Id.* at ¶ 5 (quotation and citation omitted).

"The rule governing amended judgments in Utah is well settled." *Swenson I*, 2007 UT App 359U. Substantive modifications of the judgment enlarge the time for appeal, but minor or non-substantive modifications do not. *See State v. Garner*, 2005 UT 6, ¶ 11, 106 P.3d 729 (where a judgment is modified or amended "in some material matter, the time begins to run from the time of the modification or amendment"; where the amendment or modification does not "chang[e] the substance or character of the judgment," the amendment or modification "relates back to the time the original judgment was entered, and does not enlarge the time for appeal") (quotation and citation omitted).

The criminal rules provide for the correction of certain errors at any time. Utah R. Crim. P. 30(b) governs clerical error, and Utah R. Crim. P. 22(e) governs illegal sentences.

Clerical error. "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected at any time . . . ." Utah R. Crim. P. 30(b). "A clerical error, as contradistinguished from judicial error, is not the deliberate result of the exercise of judicial reasoning and determination." *State v. Lorrah*, 761 P.2d 1388, 1389 (Utah 1988) (citation and quotation omitted). "To ascertain the clerical nature of the mistake, [a reviewing court] will look to the record to harmonize the intent of the court with the written judgment." *Id.* The correction of a clerical error "merely constitutes an amendment or modification not changing the substance or character of the judgment." *Garner*, 2005 UT 6, ¶ 11 (citation and quotation omitted). The entry of the correction is therefore "merely a nunc pro tunc entry which relates back to the time the original judgment was entered." *Swenson I*, 2007 UT App 359U, quoting *Garner*, 2005 UT 6, ¶ 11 (citation and quotation omitted). Such an amendment is "not sufficient to enlarge the time to appeal." *Id.*

Illegal sentences. "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e). "[A] rule 22(e) illegal sentence is a 'patently' illegal sentence or a 'manifestly illegal

sentence." *State v Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854 (quoting *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995), and *State v. Telford*, 2002 UT 51, ¶ 5, 48 P.3d 228). "A 'patently' or 'manifestly' illegal sentence generally occurs in one of two situations: (1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range." *Id.* (citation omitted). "[A]n appellate court may not review the legality of a sentence under rule 22(e) when the substance of the appeal is . . . a challenge, not to the sentence itself, but to the underlying conviction." *Brooks*, 908 P.2d at 859.

Analysis. In this case, two errors occurred in the original March 14, 2007 judgment. *See* R319-22. The trial court corrected both errors in its February 12, 2008 amended judgment. *See* R372-75. As explained below, the correction of the clerical error did not restart the time for an appeal. Moreover, the correction of the illegal sentence provided no basis for review of the claims defendant now raises, which are challenges, not to the new sentence, but to the underlying conviction.

Clerical error. The first error occurred when the trial court entered the conviction on count eight for a third degree felony, rather than for a class B misdemeanor. In preparing the March 14, 2007 "minutes—sentence, judgment, commitment," the court clerk inadvertently listed the conviction on count 8 as a third degree felony, despite the jury verdict finding a class B misdemeanor. *See*

R319. The trial court, not recognizing the error, signed the document, entering an erroneous judgment. *See* R322.

This was a clerical error. *See United States v. Diaz*, 190 F.3d 1247, 1252 (11th Cir. 1999) (error in entering judgment for wrong crime was clerical error); *Bowie-Myles v. United States*, 2006 WL 2092286, *3 (M.D. Fla. 2006) (unpublished) (reproduced in **Addendum G**) (error in entering judgment for wrong crime was "clerical in nature," a "scrivener's error"). The clerk who recorded count 8 as a third degree felony merely mistranscribed the information on the verdict form when preparing the amended judgment. The trial court, not realizing the error, signed the document. The error "ar[ose] from oversight or omission." Utah R. Crim. P. 30(b). The error was "not the deliberate result of the exercise of judicial reasoning and determination." *State v. Lorrah*, 761 P.2d 1388, 1389 (Utah 1988) (citation and quotation omitted).

Thus, the trial court acted properly when it corrected the error. The amended judgment entered on February 12, 2008 "merely constitutes an amendment or modification not changing the substance or character of the judgment," and "is merely a nunc pro tunc entry which relates back to the time the original judgment was entered." *Swenson I*, 2007 UT App 359U, quoting *Garner*, 2005 UT 6, ¶ 11 (citation and quotation omitted).

This amendment, the correction of a clerical error, was "not sufficient to enlarge the time to appeal." *See id.; see also United States v. Portillo*, 363 F.3d 1161, 1164-66 (11th Cir. 2004) (clerical error in judgment can be corrected at any time under rule 36, Federal Rules of Criminal Procedure, but correction does not restart period of time for appealing other matters).

Illegal sentence. The second error occurred when the trial court imposed the statutory indeterminate sentence for a third degree felony on count 8. The sentence was a legal sentence for a third degree felony conviction, but not a legal sentence for a class B misdemeanor. Once the court corrected the degree of the conviction of count 8, the illegality of the sentence imposed in the original judgment became apparent. That sentence was patently or manifestly illegal because the sentence was "beyond the authorized statutory range" for a class B misdemeanor. *Thorkelson*, 2004 UT App 9, ¶ 15 (citation omitted).

Because the sentence was an illegal sentence, the trial court had jurisdiction to correct that sentence. *See* Utah R. Crim. P. 22(e). The trial court corrected the illegal sentence when it entered its February 12, 2008 amended judgment sentencing defendant "to a term of 180 day(s)" on the class B misdemeanor count of theft by receiving stolen property. *See* R374.

But the trial court's correction of the illegal sentence does not provide grounds for review of his conviction on appeal. Utah Appellate courts have

consistently held that "an appellate court may not 'review the legality of a sentence [under rule 22(e)] when the substance of the appeal is, as it is here, a challenge, not to the sentence itself, but to the underlying conviction.'" *See State v. Finlayson*, 2000 UT 10, ¶ 8, 994 P.2d 1243 (quoting *Brooks*, 908 P.2d at 859); *see also State v. Babbel*, 813 P.2d 86, 88 (Utah 1991).

Here, defendant moved for a correction in the judgment to reflect that his sentence on count 8 was for a misdemeanor. See R360-62. The court granted that motion, corrected the error, and imposed a new sentence within the legal parameters for the misdemeanor conviction. Defendant may not obtain review of his claim regarding alleged violations of the Interstate Agreement on Detainers or his claim that the trial court erred in denying the motion to suppress by appealing from the trial court's order imposing the new and legal sentence. As explained, an appellate court may not review an appeal from an order regarding an illegal sentence "'when the substance of the appeal is, as it is here, a challenge, not to the sentence itself, but to the underlying conviction.'" *Finlayson*, 2000 UT 10, ¶ 8, quoting *Brooks*, 908 P.2d at 860. Defendant's claims are challenges not to his sentence, but to his underlying conviction.

In sum, defendant's claims on appeal challenge his conviction. Defendant could have raised these claims by filing a notice of appeal within 30 days of the March 14, 2007 judgment entering his convictions. He did not. He cannot now

appeal these matters in the context of an appeal from the trial court's correction of a clerical error because the correction of a clerical error does not restart the time for appeal. Neither can he appeal them in the context of an appeal from the correction of an illegal sentence, as his challenge is not to the new sentence, but to his conviction.

Because defendant did not timely file his original appeal and because he has no other avenue for appeal, this Court must dismiss the appeal for lack of jurisdiction.

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS; THE STATE DID NOT VIOLATE THE INTERSTATE AGREEMENT ON DETAINERS

Even if this Court decides that it has jurisdiction, it must affirm defendant's conviction because his underlying claims are without merit. Defendant first asserts that "this Court should dismiss this action" because "the State violated the Interstate Agreement on Detainers [IAD]." Br. Appellant at 9, 14 (boldface and capitalization omitted). Defendant appears to claim that the State obtained custody of defendant through the Agreement, but violated the Agreement, including its anti-shuttling provisions. *See id.* at 8-19. As a consequence, defendant asserts, the trial court lacked jurisdiction to address the charges or that, even assuming jurisdiction, the trial court should have dismissed the charges with prejudice. *See id.* In making

these claims, defendant misapprehends both defendant's custody status and the reach of the IAD.

Proceedings below. On August 24, 2006, defendant posted bond to guarantee that he would appear at the hearings in his case. R19. On January 28, defendant failed to appear. R20-21. The trial court noted on the record that it had received a facsimile from Salt Lake County indicating that defendant had been booked on several felonies and misdemeanors on August 27 and was "currently [being held] in [the] S.L.A.D.C. [without] bail." R22. The trial court then issued a no-bail bench warrant for defendant's arrest. R21. Defendant was transported from Salt Lake County and appeared before the trial court on September 12. R31. The court recalled the warrant and reinstated defendant's bail. R31. On September 13, the Cache County jail received a federal hold or detainer, asking the jail to notify the federal marshal before releasing defendant because defendant was wanted on an arrest warrant charging him with violating the conditions of his parole on a federal offense. R129. The federal hold specifically noted that the requirements of the IAD did not apply to this detainer. *Id.*

On October 17, 2006, defendant filed a "motion to dismiss [the charges against him] for lack of jurisdiction for the State's failure to comply with the Interstate Agreement on Detainers." R99. In his supporting memorandum, *see* R100-43, defendant made the claims that are now reproduced almost verbatim in his brief on

appeal. *Compare* R100-10 *with* Br. Appellant at 8-19. He claimed that when his bail was reinstated, he was entitled to release from the jail and that he was thereafter held in the jail only because the federal marshal had sent the hold to the jail personnel. *See* R106. Following a hearing on the matter, the trial court denied the motion. R145; *see also* R349:2-7 (argument and ruling on motion). The court ruled that defendant remained in state custody, even when he was out on bail, and that the federal hold did not transfer him to federal custody because it only requested notification prior to defendant's release so that federal authorities might then assume custody. R349:2-7. Before sentencing, the trial court entered a memorandum decision memorializing its denial of the motion to dismiss. R312.

Analysis. Defendant's claim fails. Defendant was in State custody at all times relevant to this case and not subject to the requirements of the IAD.

History and purpose of the IAD. Congress enacted the IAD in 1970, joining the Unites States as a "member State" or party to the Agreement. *United States v. Mauro*, 436 U.S. 340, 343 (1978); *see also* Utah Code Ann. § 77-29-5 (West 2004). Utah became a party to the agreement in 1980. *See* 1980 Utah Laws 188; *see also* Utah Code Ann. § 77-29-5. The Agreement "is designed 'to encourage the expeditious and orderly disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.'" *Mauro*, 436 U.S. at 343 (quoting Art. I of

the Agreement). "It prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction." *Id.* But, in either case, "the provisions of the Agreement are triggered only when a 'detainer' is filed with the custodial (sending) State by another State (receiving) having untried charges against the prisoner." *Id.* "Article IV(e) requires the dismissal of the indictment against a prisoner who is obtained by a receiving State if he is returned to his original place of imprisonment without first being tried on the indictment underlying the detainer and request by which custody of the prisoner was secured." *Id.* at 345 n.4; *see also* Utah Code Ann. § 77-29-5. This provision "demonstrates a concern of the Agreement that prisoners not be shuttled back and forth between penal institutions" in different jurisdictions. *Id.* at 361 & n.26.

Defendant's claims. Defendant claims that he was in federal custody when the State brought him to court, even though he was at that time incarcerated in the Cache County jail. *See* Br. Appellant at 14. He argues that although he had been incarcerated at the Cache County jail on the charges in this case, he had posted bail, was entitled to release, was held in jail only because federal authorities had placed a hold on his release, and was therefore no longer in state custody but rather in federal custody. *See id.* He claims that because he was in federal custody, the State

should have filed a detainer with the federal government and obtained temporary custody before bringing him to trial. *See id.* at 14-15. Defendant also claims that because he was in federal custody, the State had to follow the provisions of the IAD to secure his attendance at state court proceedings. *See id.* He apparently argues that each time he was returned to the Cache County jail following a court appearance, he was returned to federal custody, thus violating the provisions of the IAD that proscribe shuttling of a defendant between the custody of one jurisdiction and the custody of another. *See id.* at 16-17.

A. Defendant was not in federal custody.

Defendant cites no authority to support his theory that he was in federal custody. Defendant's argument rests of the premise that a defendant being held by a state institution upon the request of a federal marshal is in federal custody. Defendant cites no authority for this underlying claim. For that reason alone, his argument is inadequately briefed and this Court should decline to review his claim. *See* Utah R. App. P. 24(a)(9) (requiring citation to record and authorities); *State v. Thomas*, 1999 UT 2, ¶ 11-13, 974 P.2d 269 (stating that rule requires "substantive analysis"); *State v. Gamblin*, 2000 UT 44, ¶ 8, 1 P.3d 1108 (providing that briefs may be disregarded or stricken for failure to comply with rule 24).

B. The federal government had not filed a detainer under the IAD.

Moreover, defendant's claim—that the federal government had filed a detainer under the IAD that should have transferred him to federal custody—is contrary to the provisions of the IAD and without support. The federal government had filed a detainer/hold with the Cache County jail, but not a detainer governed by the IAD. The IAD addresses detainers lodged against a prisoner in order to bring that prisoner to trial on an indictment, information, or complaint in another jurisdiction that is pending during the defendant's prison term. *See* Utah Code Ann. § 77-29-5, art. III. It does not address holds for other purposes, such as the purpose for the federal marshal's hold in this case, i.e., to give the federal government opportunity to take custody of the defendant if and when a state institution decides to release him. *See Mauro*, 436 U.S. at 343 (stating that IAD applies only to transfers made to permit the prosecution of "untried charges pending against the prisoner"); *State v. Kahl*, 814 P.2d 1151, 1152 n.1 (Utah App 1991) ("Detainers based on alleged parole or probation violations . . . are not based on untried charges and thus the Interstate Agreement on Detainers is inapplicable.").

The detainer filed by the federal marshal in this case specifically advised that "[t]he notice and speedy trial requirements of the Interstate Agreement on Detainers do NOT apply to this detainer, which is based on a **Federal probation/supervised**

release violation warrant." R129 (federal hold) (capitalization and boldface in original) (reproduced in **Addendum H**). The hold did not request a transfer to federal custody, but advised that "[t]he United States District Court for the District of UTAH has issued an arrest warrant charging the subject with violation of the conditions of probation and/or supervised release" and asked that the jail, "[p]rior to the subject's release from [its] custody," notify the United States Marshal's office "so that we may assume custody if necessary." *Id.* Thus, nothing in the detainer suggested that the federal government had taken custody of defendant at the Cache County jail. Nothing suggests that the marshal's hold had effected a transfer of defendant from state to federal custody.

C. Defendant was in state custody because he no longer qualified for release on his state charges.

Defendant, in fact, was not held at the jail because he had been transferred to federal custody, but because he no longer qualified for bail on his state charges. Under statutory law, a person may not be admitted to bail as a matter of right if he is charged with a "felony committed while on probation or parole . . . when the court finds there is substantial evidence to support the current felony charge." Utah Code Ann. § 77-20-1(1)(b) (West 2004). The court stayed defendant's bond when it learned of the federal hold, which advised the court of defendant's status as a parolee. R38. At a subsequent hearing, the court found "substantial evidence of

crime [i.e., the criminal activity charged in this case] committed while on parole [in the federal case]," found that the evidence sufficed to bind defendant over on the charges in this case, and revoked defendant's bail. R44.[1]

As explained, a defendant is not entitled to release on bail where a court has determined that substantial evidence exists to show that the defendant has committed a state felony while on parole. The court denied release for that reason, not because defendant was in federal custody.

D. Defendant was not "shuttled" between jurisdictions in violation of the IAD.

One purpose of the IAD is to prevent a defendant's being unnecessarily "shuttled" back and forth between jurisdictions. Where a defendant is removed from prison in one state and sent to another state to face trial on pending charges and trial is not held on those charges prior to "the return of the prisoner to the original place of imprisonment," such charges must be dismissed with prejudice. Utah Code Ann. § 77-29-5, art. III(e).

Defendant apparently claims that he was shuttled back and forth between Utah courts and federal custody in violation of the IAD when, at the close of each

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[1] Defendant has not included transcripts of these hearings in the record on appeal. The State therefore can provide no further details on the trial court's analysis.

day of court proceedings, he was taken from the county courthouse to the Cache County jail and then back to the county courthouse for the next day of proceedings.[2] This claim rests on defendant's presumption that he was in federal custody at the Cache County jail. As explained, defendant was not in federal custody at the Cache County jail simply because the federal marshal had requested notification before defendant's release from that facility. Defendant's anti-shuttling claim fails because defendant never left state custody. He cannot show that when the State returned him to the Cache County jail following his various court appearances, the State returned him to federal custody and violated the provisions of the IAD.

E. Utah courts had jurisdiction to try defendant.

Finally, defendant claims that a violation of the IAD deprives a court of jurisdiction. *See* Br. Appellant at 9, 15. Defendant provides no authority for this claim. While, under carefully delineated circumstances not present in this case, a violation of the IAD may require that a case be dismissed with prejudice, nothing in the IAD can be read to strip a court of jurisdiction. *See* Utah Code Ann. § 77-29-5. Rather, as Utah courts have observed, "rights created by the IAD [] are statutory,

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[2] Defendant has set forth no authority to show that trial in a state court of a defendant held in federal custody within the same state violates the IAD. Because defendant has not shown that he was in federal custody, the State does not address that matter.

not fundamental, constitutional, or jurisdictional in nature." *State v. Brocksmith*, 888 P.2d 703, 705 (Utah App. 1994) (quotation and citation omitted); *State v. Penman*, 964 P.2d 1157, 1164 (Utah App. 1998) (same). Moreover, as explained, defendant has demonstrated no violation of the IAD.

Defendant's claim that he was improperly brought to court and improperly shuttled between state and federal custody therefore fails. He cannot show that the trial court lacked jurisdiction or that it should have dismissed the charges with prejudice.

III.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS; ANY INITIAL SEARCH WAS PERMISSIBLE UNDER THE AUTOMOBILE EXCEPTION AND THE INDEPEDENDENT POST-ARREST SEARCH WAS PERMISSIBLE AS A SEARCH INCIDENT TO ARREST AND AS AN INVENTORY SEARCH

Defendant next claims that "the trial court erred when [it] denied [his] motion to suppress evidence," alleging that the police search of his vehicle was without probable cause and without consent. Br. Appellant at 19 (boldface omitted). He claims specifically that Officer Hansen had only reasonable suspicion to detain him, but not probable cause, because Officer Hansen "[wa]s not sure whether the person he detained had anything to do with the burglary." *Id.* at 20.

Facts relevant to motion to suppress.[3] Just before midnight on August 16, 2006, Officer Brad Hansen received a burglary call for an alarm that had been set off at the Top Stop convenience store on Tenth North and Main in Logan. R349:14-15; *see also* R244(PH):6. Officer Hansen traveled north on Main until he reached the convenience store, arriving within a minute or two of the alarm call. R349:15, 17. He entered the store's parking lot on the south, drove his vehicle around the east side, and then continued to the north parking lot, stopping about midway through that lot. *Id.* As Officer Hansen drove up Main and into the parking lot, he did not see anyone jogging. R349:15, 43.

As he parked his car, Officer Hansen noticed defendant running from the northwest corner of the building toward his police vehicle. R349:15-16. Defendant was wearing sweat pants and "sweating profusely." R349:16. Officer Hansen asked defendant what he doing, and defendant said that he was "out for a jog." *Id.*

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[3] The trial court judge, who had presided at the preliminary hearing a month before the hearing on the motion to suppress, asked the parties to focus on when the officers entered defendant's truck. R349:13. He suggested that the parties not dwell on "the other facts leading up to that point." *See* R349:14. The State therefore supplements the facts presented at the suppression hearing with facts presented at the preliminary hearing, where useful for context.

The transcript of the preliminary hearing is contained in Packet A of the record. Packet A also contains two other transcripts. The packet has been assigned record number 244 (R244). To distinguish the transcript of the preliminary hearing from the other two transcripts, the State refers to it as R244(PH).

Defendant said "that he was a truck driver and that he jog[ged] in between the routes to keep in shape." *Id.* Officer Hansen told defendant why he was there and asked defendant whether he had seen anything. R244(PH):7; R349:16. Defendant said he had not. *Id.* Because of "the number of alarms [police receive] that are false," Officer Hansen let defendant go and defendant ran east. *Id.*

Officer Hansen then continued his investigation at the Top Stop. As he drew closer to the building, he saw a crow bar, a large axe/sledge hammer, a hat, and a pair of gloves. R349:16-17. He noted that the lock to the door had been removed. R349:17. Damage to an ATM machine was visible through a window. R349:24.[4]

Having seen evidence that a burglary had actually occurred, Officer Hansen began looking for defendant. R349:17. Defendant was the only person he had seen in the area when he arrived there within two minutes of receiving the alarm call, and defendant had approached him from the exact area where the door lock had been removed and the tools abandoned. R349:17-18.

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[4] It is not clear whether Officer Hansen saw the damaged ATM when he first saw the burglary tools and gloves or whether he saw it during a later investigation of the building. *See* R349:24.

Officer Hansen turned east and saw "a large semi truck, car hauler, parked in the . . . car wash parking lot" just east of the Top Stop. R349:18. Defendant was in the cab, the truck was running, and the dome light was on. R349:18, 36.

As Officer Hansen approached, defendant "came out of the vehicle, around the front of the truck, with his hands in the air," saying, "I didn't do it, I didn't do it, I didn't do anything." R349:19. Officer Hansen then asked defendant to sit on the ground. *Id.* Defendant "dropped his hands, but he continued to advance towards [the officer]." *Id.* Officer Hansen then pulled out his Tazer and again ordered defendant to sit on the ground. *Id.* This time defendant complied. *Id.*

Officer Hansen called for backup because "the situation was not a safe situation at that point." R349: 19. Backup Officer Ostermiller arrived and "started to deal with [defendant], talking with him, getting his name, information, so that we could verify who we had, who we were talking with at that point." R349:20. Officer Ostermiller ran inquiries that shortly returned information defendant "had a warrant for his arrest out of Salt Lake." R349:22.

After Officer Ostermiller began getting defendant's information, Officer Robert Olsen arrived. R349:20.

The initial inspection. Officers Hansen and Olsen then returned to the Top Spot to further investigate the crime scene. *Id.* After "walk[ing] around the sidewalk area of Tenth North looking for the lock" that had been popped off, Officer

Hansen walked over to the car wash parking lot to check out the semi-truck/car hauler. *Id.* He stepped up onto the driver's door area and found the driver's window was down. *Id.* He looked in and saw "miscellaneous tools in the passenger cab area of the truck," including a gas-powered chop saw. R349:20-22.

While checking out the truck, Officer Hansen used a flashlight to illuminate the inside. R349:28. At some point, apparently as he focused the light on the floor and illuminated a glove, his hand holding the flashlight went through the open window. R349:28-29. Officer Hansen did not poke his head in, did not open the truck door, and did not touch anything in the truck. R349:22, 29-30. But, as he looked down onto the floor, he saw a blue glove similar to the gloves by the Top Spot. R349:29.

When he got down, he informed defendant that "he was being detained for a possible burglary." R349:22. "At that point Officer Ostermiller also informed [Officer Hansen] that [defendant] had a warrant for his arrest out of Salt Lake." *Id.* The officers arrested defendant and transported him to the police department. R349:22-23.

The post-arrest search. The truck was still running. R349:36. Because no one was there to pick it up, the officers performed a "safe keep" inventory to protect the vehicle before impounding it. R349:36-37. During the inventory the officers found

burglary tools, a computer identified as a computer taken from a Papa Murphy's burglary, and other evidence of criminal activity. R349:37-40.

Proceedings below. On October 17, 2006, defendant filed a motion to suppress evidence found in the truck and a supporting memorandum, and the trial court conducted a hearing on the motion. R94, 95-98, 144-46; 349:7. The State called witnesses who testified to events that occurred on the night of the offense. RR349:7-49.

After receiving this testimony, the trial court denied the motion to suppress. R349:49. The trial court ruled that defendant was properly detained. R349:48. The court stated that Officer Hansen's looking through the cab window was not "necessarily inappropriate," but that "irrespective of whether the glove was seen or not seen by Officer Hansen, the defendant was . . . already legally in custody" and that "once the existence of the warrant was discovered anything thereafter was a search incident to an arrest, sufficient for an inventory purpose and consistent with further investigation of the burglary of the service station." R349:49.

The trial court reconfirmed this ruling on the first day of trial. *See* R350:88-89. The court stated, "I found that the detention of the defendant on a temporary basis was justified given all of the circumstances. And that there were articulable reasons to suspect that the defendant [may have been] involved in criminal

activities sufficient to detain him long enough to conduct the investigation, which resulted in the discovery of a warrant for his arrest and therefore he was arrested." R350:88. The trial court continued, "The search of the vehicle thereto was consistent with the fact that it was there remaining and was running and apparently belonged to the defendant and had to be seized and inventoried and protected." *Id.*

Legal grounds apparent in the record. Officer Hansen's initial inspection of the truck, if a search, was a lawful search under the automobile exception to the warrant requirement.[5] The post-arrest search was lawful as a search incident to defendant's arrest on an outstanding warrant, and, as the trial court ruled, as an inventory search of an impounded vehicle.

A. This Court should decline review of defendant's claim because it is inadequately briefed.

Defendant's claim is inadequately briefed, and this Court should decline to review it.

Adequate briefing. Rule 24(a)(9), Utah Rules of Appellate Procedure, requires an appellant's brief to set forth an argument that "contain[s] the contentions and reasons of the appellant with respect to the issues presented, including the grounds

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[5] This Court may affirm the trial court's denial of the motion to suppress on any basis apparent in the record. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158.

for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." It is not enough under this rule to superficially cite to authority; rather, the rule requires a "substantive examination" of the contention presented. *State v. Thomas*, 1999 UT 2, ¶¶ 11-13, 974 P.2d 269. "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *Id.* at ¶ 11 (quotation and citations omitted). *Accord State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in their briefs"). "Briefs that do not comply with rule 24 'may be disregarded or stricken, on motion or sua sponte by the court.'" *Gamblin*, 2000 UT 44, ¶ 8 (quoting Utah R. App. P. 24(k)).

Defendant asserts that the trial court erred when it denied his motion to suppress evidence discovered in a search of his semi-truck. Br. Appellant at 19. Defendant notes that the "automobile exception" permits the warrantless search of a mobile vehicle where probable cause exists to believe that it contains evidence of a crime. *See id.* He concedes that his truck was mobile. *See id.* He contends, however, that probable cause was lacking to search the vehicle. He does not address any of the evidence suggesting that the truck might contain evidence but merely asserts

that the "officer admit[ted] that he [wa]s not sure whether the person he detained had anything to do with the burglary." *Id.* at 20.

Defendant cites no authority for his implicit claim that probable cause requires the certainty, not the probability, that evidence will be found. Nor does he set forth the record evidence to which the officer testified and upon which the officer determined that evidence would likely be found in the truck.

Thus, defendant has dumped the burden of research on the court, leaving the court to research both the record and the law and to analyze the record facts in light of the law. His claim is inadequately briefed, and this Court should decline to review it.

B. Assuming a search occurred, the search was lawful under the automobile exception to the warrant requirement.

In any event, assuming that Officer Hansen inspection of defendant's semi-truck cab through its open window was a search, the search was lawful under the automobile exception.

1. No Fourth Amendment search occurred.

As a preliminary matter, the State does not concede that any search occurred. In some situations, an officer may discover evidence in "a situation in which there has been no Fourth Amendment search at all." LaFave, *Search and Seizure* § 2.2(a) at 448 (4th ed. 2004). This may occur where "an observation is made by a police officer without a prior physical intrusion into a constitutionally protected area." *Id.*

In this case, Officer Hansen looked through the open window of defendant's semi-truck, which was idling in the car wash parking lot where defendant had parked it. R349:20-22, 36. The chop saw and miscellaneous tools were visible from the window. R349:20-22. Officer Hansen also saw a blue glove in the floor area of the cab similar to the gloves by the Top Spot door. *Id.*

Officer Hansen admitted that his hand passed through the plane of the open window when he used his flashlight to look down onto the floor where he saw the glove. R349:29. At that point, however, Officer Hansen had already seen the burglary tools in the truck's cab. R349:22, 24. Even assuming a search occurred when Officer Hansen's hand entered the open window, Officer Hansen had discovered the tools before that search, and evidence of the tools was not fruit of that search. Rather, discovery of the tools in the cab only increased the evidence supporting probable cause to believe that evidence of a burglary would be found in

the cab. As explained below, once Officer Hansen had probable cause, any search was permissible under the automobile exception.[6]

2. If a search occurred, it was permissible under the automobile exception.

Automobile exception. In most cases, police must seek a warrant before conducting a search. *See Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (citing *California v. Carney*, 471 U.S. 386, 390-91 (1985)). If, however, "a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). Under "established precedent, the 'automobile exception' has no separate exigency requirement." *Dyson*, 527 U.S. at 466. This exception is based first "on the automobile's 'ready mobility' and second on "the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation." *Labron*, 518 U.S. at 940.

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[6] Moreover, it appears that the only piece of evidence that Officer Hansen found after his hand passed through the window was the glove. R349:29. As the trial court observed, "[t]he discovery of the glove" was only "tangentially related" to the other evidence Officer Hansen saw looking through the window. R350:88. Failure to suppress evidence of the glove was, if anything, harmless error. *See* LaFave, *Search & Seizure* § 11.7(f) at 479 & n.264 (4th ed. 2004 & Supp. 2008-2009) and cases cited therein.

Probable cause. "[P]robable cause is a flexible, common-sense standard" and "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' . . . that certain items may be contraband or stolen property or useful as evidence of a crime[.]" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132,162 (1925)). "[I]t does not demand any showing that such a belief be correct or more likely true than false." *Id.* It requires simply "a reasonable ground for belief," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003), not "a probability, and not a prima facie showing, of criminal activity," *Illinois v. Gates*, 462 U.S. 213, 235 (1983). In other words, "[t]he process" of calculating probable cause "does not deal with hard certainties, but with probabilities." *Brown*, 460 U.S. at 742.

"The determination of whether probable cause exists" for a warrantless search of a vehicle "depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made." *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)); *see also Carroll v. United States*, 267 U.S. 132, 149 (1925) (probable cause is "a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction"). "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists,"

Ornelas v. United States, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981).

Analysis. Here, defendant concedes that Officer Hansen had reasonable suspicion to detain defendant, *see* Br. Appellant at 20, and that the semi-truck was mobile, *See id.* at 19. Defendant argues, however, that Officer Hansen lacked probable cause to believe that defendant's semi-truck would contain evidence of the Top Stop burglary.

Defendant's claim fails. An examination of all of the information known to Officer Hansen when he first looked through the truck's window demonstrates that he had probable cause to believe that the truck might contain evidence of the Top Spot burglary. First, only two minutes before he arrived on the scene, Officer Hansen had received an alarm call informing him that a burglary alarm had sounded at the business. R349:14-17. Second, he had seen evidence of a burglary at the Top Spot's northwest door. Outside that door, he saw burglary tools—a crow bar and a large axe/sledge hammer. R349:16-17. Moreover, he saw that the someone had popped out the door's lock. *Id.* These facts would warrant a man of reasonable caution in the belief that a burglary had occurred.

Further, Officer Hansen had probable cause to believe not only that a burglary had occurred, but also that defendant had been involved in the incident. Driving to the scene just before midnight, Officer Hansen had seen only one person anywhere

in the vicinity of the Top Spot. *Id.* That person, defendant, had come running toward Officer Hansen's car as Officer Hansen pulled into the Top Spot's north parking lot. *Id.* Defendant was running from the northwest corner of the Top Spot building, the place where Officer Hansen, prior to the search, found the burglary tools and the door with its lock popped out. R349:16-18. Defendant was sweating profusely, indicating that he had been engaged in some physically taxing activity. R349:16. While he claimed that he had been jogging, Officer Hansen had seen no one jogging in the area as he approached the scene. R349:15. In addition, the tools at the northwest door suggested that some physical exertion had been required to force entry.

Officer Hansen, moreover, had probable cause to believe that the truck contained evidence of the crime. After allowing defendant to go, Officer Hansen had watched defendant run east. R349:16. When Officer Hansen then saw burglary tools and the popped-out lock by the Top Spot door and realized that this had not been a false alarm, he immediately looked for defendant. R349:17. He saw defendant sitting in a lighted semi-truck, parked and running in the car wash lot that abutted the Top Spot parking lot on the east. R244(PH):8; R349:18. Officer Hansen had probable cause to believe that defendant might have transported items used in the burglary or something taken in the burglary to the semi-truck. Defendant may have had additional burglary tools in the truck. He may have been

in the process of moving items out of the Top Spot into the truck and may have placed those items in the truck before Officer Hansen arrived on the scene. He may have secreted items taken from the Top Spot on his person and may have been carrying those items to the truck when Officer Hansen first spotted him. For all of these reasons, Officer Hansen had probable cause to believe that the semi-truck might contain evidence of defendant's involvement in the crime.

Further, as Officer Hansen approached the semi-truck, defendant jumped out and walked toward him, protesting, "I didn't do it. I didn't do it." R349:19. Defendant's unusual behavior suggested a consciousness of guilt. *See Watson v. State*, 1999 WL 21470 (Tex. App.) (unpublished) (reproduced in **Addendum I**).

Finally, Officer Hansen had, as an additional basis for probable cause, the information he acquired when he first looked through the open truck window and saw the gas-powered chop saw and miscellaneous tools in the passenger cab area of the truck. R349:21-22, 24. Officer Hansen could see these items, visible through the window, R349:24, before any search that may have begun when his hand entered the truck window. R349:28-29.

In sum, because defendant was the only person near the Top Spot when Officer Hansen arrived, because Officer Hansen saw defendant there within minutes of the alarm, because defendant was coming from the area near the popped-lock door, because defendant's sweating would have been consistent with physical

exertion to break into the building, because defendant's behavior was so unusual, and because Officer Hansen could see the chop-saw and various other tools when he looked through the truck window, Officer Hansen had probable cause to believe that defendant may have been involved in the burglary. The facts known to Officer Hansen were sufficient to warrant a man of reasonable caution in the belief that defendant was the person who had burglarized the Top Spot and in the belief that evidence of his involvement might be found within his semi-truck.

Defendant claims that Officer Hansen "[wa]s not sure whether the person he detained had anything to do with the burglary" but "still entered the . . . truck." Br. Appellant at 20. That is beside the point. As explained, probable cause "does not demand any showing that such [an officer's] belief be correct or more likely true than false." *Brown*, 460 U.S. at 742. It sufficed that Officer Hansen's belief was reasonable.

Because Officer Hansen had probable cause to believe that the truck contained evidence of the burglary and because the truck was indisputably mobile, Officer Hansen's initial inspection or search of the truck was lawful.

C. Evidence was lawfully obtained independently of any information found in the initial search of the truck—first, as a search incident to arrest, and second, as an inventory search.

Even assuming that Officer Hansen's initial pre-arrest search of defendant's vehicle was unlawful, the challenged evidence was admissible under the

independent source doctrine. Independent of any information found in the initial search, the officers arrested defendant on an outstanding warrant and lawfully searched his truck (1) in a search incident to that arrest and (2) in a pre-impoundment inventory search.

Independent source doctrine. Even where evidence is initially discovered during an unlawful search, the exclusionary rule does not prohibit the use of the evidence discovered if the challenged evidence also has an independent source. The independent source doctrine applies "to evidence obtained for the first time during an independent lawful search" and also "to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537 (1988).

The United States Supreme Court explained the doctrine as a matter of public policy. "'[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. . . .'" *Murray*, 487 U.S. at 537 (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984) (emphasis in *Nix*). The Court explained, "'When the challenged evidence has an independent source, exclusion of such

evidence would put the police in a worse position than they would have been in absent any error or violation." *Id.* (citing *Nix*, 467 U.S. at 443).

1. Running a warrants check unconnected with the initial search of the truck, Officer Ostermiller discovered an outstanding warrant for defendant's arrest. Police lawfully arrested defendant on the basis of that warrant.

After Officer Hansen had detained defendant, he called for backup. R349:19. Backup Officer Ostermiller arrived, took responsibility for obtaining defendant's information, and ran a warrants check. R349:20. While Officer Ostermiller remained with defendant and ran the warrants check, Officer Hansen returned to the Top Spot and then began looking in the open window of defendant's truck. R349:20-22.

Officer Ostermiller's decision to run the warrants check was not prompted by anything that Officer Hansen saw during his initial search of the truck, but was part of his effort to obtain information about defendant—the assignment he undertook when the other officers left to further investigate the burglary.

When Officer Hansen again joined Officer Ostermiller, Officer Ostermiller informed Officer Hansen that he had learned that defendant was wanted on an outstanding warrant out of Salt Lake. R349:22. Defendant was lawfully arrested on the basis of this outstanding warrant.

2. Officers lawfully searched defendant's truck in a search incident to defendant's arrest on an outstanding warrant. Evidence found in that search had a source independent of anything found in the initial search of the truck.

Search incident to arrest. When a defendant is lawfully arrested, police may conduct a search incident to arrest. They need not have probable cause to believe that they will find arms or discover evidence. *New York v. Belton*, 453 U.S. 454, 461 (1981). "'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'" *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)). "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and "also examine the contents of any containers found within the passenger compartment." *Id.* at 460 (citation omitted). Moreover, a vehicle search incident to arrest is lawful even in circumstances where an arrestee has "exited his car before the officer initiated contact," that is, whether the arrestee is an "occupant" or a "recent occupant" of the car, as was the case here. *Thornton v. United States*, 541 U.S. 615, 621-22 (2004).

Having arrested defendant in this case, officers were entitled to search the cab of the truck incident to that arrest. And it was during that search that the officers

seized the burglary evidence inside the cab. The evidence the officers found in the search incident to arrest therefore had a source independent of evidence discovered during any initial truck search. That evidence, the product of the outstanding warrant, was admissible under the "independent source" doctrine.

3. Alternatively, officers conducted a lawful inventory search of the truck following defendant's arrest on his outstanding warrant. Evidence found in the inventory search had a source independent of anything found in the initial search of the truck.

Inventory searches. Alternatively, where police legally arrest a defendant who is driving a car, they may inventory the car prior to impounding it. "[I]nventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). "The policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause." *Id.* (citation omitted). Rather, "inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Id.* at 372. The United States Supreme Court "has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976).

Here, after arresting defendant on his outstanding warrant, police inventoried the truck he had been driving. Officer Scott Bodily testified that at the time defendant was arrested pursuant to the warrant, his truck was still running. R349:36. "[N]o one was there to pick it up so the truck needed to be safe[-]keep[-] inventoried to protect the vehicle itself." *Id.* "[A]t the very least an inventory of the contents of the vehicle needed to be done prior to that impound." R349:36-37. During the inventory, the officers discovered evidence of defendant's involvement in the burglary and in other crimes. *See* R349:37-38 (noting chop saw, bolt cutter, computer taken from a Papa Murphy's burglary, etc.).

Again, defendant claims that the initial pre-arrest truck inspection was unlawful and that "[a]ll items found in the truck should have been excluded from evidence." Br. Appellant at 21. Assuming arguendo that evidence in the truck "was initially discovered during, or as a consequence of, an unlawful search," that evidence was "later obtained independently from activities untainted by the initial illegality." *Murray*, 487 U.S. at 537. Because the inventory search was conducted independently from any alleged illegality, the evidence found in the inventory search was admissible.

CONCLUSION

This Court should dismiss defendant's appeal for lack of jurisdiction. If the Court finds that it has jurisdiction, it should affirm defendant's conviction because

defendant has not shown that the State violated the Interstate Agreement on Detainers or that the trial court erred in refusing to exclude the evidence found in the truck.

Respectfully submitted February 25, 2009.

MARK L. SHURTLEFF
Utah Attorney General

JEANNE B. INOUYE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2009, I served two copies of the foregoing Brief of Appellee upon the defendant/petitioner, KENDALL ROSELL SWENSON, by causing them to be delivered by hand or by first-class mail, postage prepaid, to his counsel of record as follows:

DAVID M. PERRY
Perry, Malmberg & Perry
14 W. 100 N.
Logan, UT 84321

Addenda

Addendum A

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

77-29-5. Interstate agreement on detainers -- Enactment into law -- Text of agreement.

The interstate agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of co-operative procedures. It is the further purpose of this agreement to provide such co-operative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final dispositions pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also

inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to a paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in

the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in the article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the

prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until

such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held

contrary to the Constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

Enacted by Chapter 15, 1980 General Session
Download Code Section Zipped WordPerfect 77_29_000500.ZIP 7,431 Bytes

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Sections in this Chapter|Chapters in this Title|All Titles|Legislative Home Page

Last revised: Friday, December 12, 2008

Utah Rules of Appellate Procedure

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

Utah Rules of Criminal Procedure

Rule 30. Errors and defects.

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

Utah Rules of Criminal Procedure

Rule 22. Sentence, judgment and commitment.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

Addendum B

IN THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff,	)	JURY VERDICT
	)	
-vs-	)	COUNTS 1-10
	)	
KENDALL SWENSON,	)	Case No. 061100748
	)	
Defendant.	)	

We the jurors duly impaneled find the Defendant, KENDALL ROSELL SWENSON:

COUNT 1:

✓ Not Guilty of Possession of a controlled substance, to wit: Cocaine, a Third Degree Felony. (Subject to wording of instruction ~~#7~~ #6)

___ Guilty of Possession of a controlled substance, to wit: Cocaine, Third Degree Felony.

COUNT 2:

___ Not Guilty of Burglary, a Third Degree Felony.

✓ Guilty of Burglary, a Third Degree Felony.

COUNT 3:

___ Not Guilty of Burglary, a Third Degree Felony.

✓ Guilty of Burglary, a Third Degree Felony.

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COUNT 4:

____ Not guilty of Criminal Mischief, a third degree felony.

✓ Guilty of Criminal Mischief, a third degree felony.

COUNT 5:

____ Not guilty of Criminal Mischief, a class A misdemeanor.

✓ Guilty of Criminal Mischief, a class A misdemeanor.

COUNT 6:

✓ Not guilty of Possession of Paraphernalia, within 1000 feet of a school, a class A misdemeanor. (Subject to wording of instruction # 11)

____ Guilty of Possession of Paraphernalia, within 1000 feet of a school, a class A misdemeanor.

COUNT 7:

____ Not guilty of Theft, a third degree felony.

✓ Guilty of Theft, a third degree felony.

COUNT 8:

____ Not guilty of Theft by Receiving Stolen Property, a class B misdemeanor.

✓ Guilty of Theft by Receiving Stolen Property, a class B misdemeanor.

COUNT 9:

____ Not guilty of Theft by Receiving Stolen Property, a third degree felony

✓ Guilty of Theft by Receiving Stolen Property, a third degree felony

COUNT 10:

___ Not guilty of Unlawful Possession of Burglary Tools, a class B misdemeanor

✓ Guilty of Unlawful Possession of Burglary Tools, a class B misdemeanor

Dated: October 19, 2006

John Paul Abbott

Jury Foreperson

Addendum C

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 061100748 FS
KENDALL ROSELL SWENSON, Defendant.	:	Judge: GORDON J LOW Date: March 5, 2007

PRESENT
Clerk: tracih
Prosecutor: SWINK, JAMIE M
Defendant
Defendant's Attorney(s): PERRY, DAVID M

DEFENDANT INFORMATION
Date of birth: March 28, 1963
Video
Tape Count: 4:04

CHARGES

2. BURGLARY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
3. BURGLARY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
4. CRIMINAL MISCHIEF - INTENTIONAL DAMAGE - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
5. CRIMINAL MISCHIEF - INTENTIONAL DAMAGE - Class A Misdemeanor
- Disposition: 10/19/2006 Guilty
7. THEFT - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
8. THEFT BY RECEIVING STOLEN PROPERTY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
9. THEFT BY RECEIVING STOLEN PROPERTY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
10. MANUFACTURE/POSSESS BURGLARY TOOLS - Class B Misdemeanor
- Disposition: 10/19/2006 Guilty

319 03-14-07

Case No: 061100748
Date: Mar 05, 2007

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of CRIMINAL MISCHIEF - INTENTIONAL DAMAGE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the CACHE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court orders felony and misdemeanor charges to run concurrent at Utah State Prison. Court reccommends credit for time served.

Case No: 061100748
Date: Mar 05, 2007

SENTENCE RECOMMENDATION NOTE

Court orders restitution in the amount of $5,210.00.

SENTENCE JAIL

Based on the defendant's conviction of CRIMINAL MISCHIEF - INTENTIONAL DAMAGE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

Based on the defendant's conviction of MANUFACTURE/POSSESS BURGLARY TOOLS a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

SENTENCE FINE

Charge # 2
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 3
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 4
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 5
Fine: $2500.00
Suspended: $0.00
Surcharge: $2150.00

Case No: 061100748
Date: Mar 05, 2007

	Due:	$4650.00
Charge # 7	Fine:	$5000.00
	Suspended:	$0.00
	Surcharge:	$4275.00
	Due:	$9275.00
Charge # 8	Fine:	$5000.00
	Suspended:	$0.00
	Surcharge:	$4275.00
	Due:	$9275.00
Charge # 9	Fine:	$5000.00
	Suspended:	$0.00
	Surcharge:	$4275.00
	Due:	$9275.00
Charge # 10	Fine:	$1000.00
	Suspended:	$0.00
	Surcharge:	$875.00
	Due:	$1875.00
Total	Fine:	$33500.00
Total	Suspended:	$0
Total	Surcharge:	$28675.00
Total Principal	Due:	$62175.00
		Plus Interest

Pay fine to The Court.

Dated this 14 day of March, 2007

GORDON J. LOW
District Court Judge

Addendum D

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

STATE OF UTAH, Plaintiff vs. KENDALL SWENSON Defendant	ADDENDUM TO SENTENCE, JUDGMENT, COMMITMENT Case No: 061100748 FS Judge Low

This matter is before the Court upon a Motion filed by the defense to amend the original Sentence, Judgment, and Commitment on the above referenced case.

In response, this Court has addressed the motion with both counsel on previous occasions and on this the 27th day of July, 2007. In an effort to expedite the matter the Court issues the following Order and where applicable a recommendation to the Federal Board of Pardons and any other parties associated with this case.

Subsequent to a jury trial conviction, on March 5,2007 this Court sentenced the above referenced defendant. Burglary Felony 3rd, two counts, 0-5 years each. Criminal Mischief Felony 3rd, 0-5 years. Theft By Receiving Stolen Property Felony 3rd, two counts, 0-5 years each. Manufacturing/Possession Burglary Tools class B Misdemeanor, 180 days.

The Court ordered all counts to run concurrent and to be served at the Utah State Prison and recommended credit for time served.

The Defendant has a pending Federal case, or is on Federal Parole any details of which this Court is uninformed.

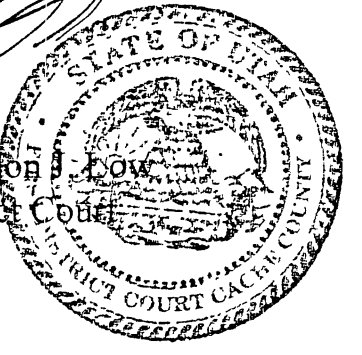
344 07/30/07

This Court had at the time of sentencing expressed the intention that this sentence is to run concurrent with any Federal court. This Order is in clarification that the state's case is not to run consecutive to any proceedings by the Federal authorities and that this sentence can be served concurrent at any applicable Federal institution or the Utah State Prison.

Dated this 30 day of July, 2007

BY THE COURT

Judge Gordon J. Low
First District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 061100748 by the method and on the date specified.

METHOD	NAME
Mail	BOARD OF PARDONS & PAROLE Third Pty Plaintiff 448 E 6400 S. SUITE 300 MURRAY, UT 84107
By Hand	DAVID M PERRY
By Hand	JAMIE M SWINK

Dated this 30 day of July, 2007.

Deputy Court Clerk

Addendum E

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Kendall R. Swenson, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070346-CA F I L E D (November 1, 2007) 2007 UT App 359

First District, Logan Department, 061100748
The Honorable Gordon J. Low

Attorneys: David M. Perry, Logan, for Appellant
Mark L. Shurtleff and Kris C. Leonard, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and Thorne.

PER CURIAM:

Kendall R. Swenson appeals from his convictions after a jury trial. This is before the court on its own motion for summary disposition based on lack of jurisdiction.

Under rule 4 of the Utah Rules of Appellate Procedure, a notice of appeal must be filed within thirty days after the entry of the order appealed from. See Utah R. App. P. 4(a). In a criminal case, it is the sentence that constitutes the final judgment from which to appeal. See State v. Bowers, 2002 UT 100, ¶ 4, 57 P.3d 1065. The "'[thirty]-day period for filing [a] notice of appeal in a criminal case . . . is jurisdictional and cannot be enlarged by this [c]ourt.'" Id. ¶ 5 (alterations in original) (quoting State v. Johnson, 635 P.2d 36, 37 (Utah 1984)).

Swenson was sentenced at a sentencing hearing on March 5, 2007. The trial court formally entered Swenson's sentence in the record on March 14, 2007. Swenson filed his notice of appeal on April 20, 2007, thirty-seven days after the entry of his sentence and outside of the time to appeal. As a result, this court lacks jurisdiction over the appeal. See id.

Swenson argues, however, that an addendum to the sentence entered on July 30, 2007, re-started his time to appeal. The rule governing amended judgments in Utah is well-settled:

> "[W]here a belated entry merely constitutes an amendment or modification not changing the substance or character of the judgment, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal; but where the modification or amendment is in some material matter, the time begins to run from the time of the modification or amendment."

State v. Garner, 2005 UT 6, ¶ 11, 106 P.3d 729 (quoting Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264, 268 (1947)).

Here, the addendum to the sentence did not constitute a material change. The addendum clarified that Swenson's state sentences were to run concurrently with any federal case ongoing. The clarification does not change the substance or character of the judgment, particularly since the failure to specify that the sentences were concurrent in the sentencing order was a mere oversight. As a clarification rather than a material change, the addendum is not sufficient to enlarge the time to appeal. Accordingly, Swenson's notice of appeal was untimely filed and this court lacks jurisdiction over the appeal.

Dismissed.

_____
Russell W. Bench,
Presiding Judge

_____
James Z. Davis, Judge

_____
William A. Thorne Jr., Judge

Addendum F

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

		AMENDED.
STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 061100748 FS
	:	
KENDALL ROSELL SWENSON,	:	Judge: GORDON J LOW
Defendant.	:	Date: March 5, 2007

PRESENT
Clerk: tracih
Prosecutor: SWINK, JAMIE M
Defendant
Defendant's Attorney(s): PERRY, DAVID M

DEFENDANT INFORMATION
Date of birth: March 28, 1963
Video
Tape Count: 4:04

CHARGES

2. BURGLARY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
3. BURGLARY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
4. CRIMINAL MISCHIEF - INTENTIONAL DAMAGE - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
5. CRIMINAL MISCHIEF - INTENTIONAL DAMAGE - Class A Misdemeanor
- Disposition: 10/19/2006 Guilty
7. THEFT - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
8. THEFT BY RECEIVING STOLEN PROPERTY - Class B Misdemeanor
- Disposition: 10/19/2006 Guilty
9. THEFT BY RECEIVING STOLEN PROPERTY - 3rd Degree Felony
- Disposition: 10/19/2006 Guilty
10. MANUFACTURE/POSSESS BURGLARY TOOLS - Class B Misdemeanor
- Disposition: 10/19/2006 Guilty

372 02-12-08

Case No: 061100748
Date: Mar 05, 2007

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of CRIMINAL MISCHIEF - INTENTIONAL DAMAGE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the CACHE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court orders felony and misdemeanor charges to run concurrent at Utah State Prison. Court reccommends credit for time served.

SENTENCE RECOMMENDATION NOTE

Court orders restitution in the amount of $5,210.00. Court recommends that this sentence runs concurrent with federal sentence.

Case No: 061100748
Date: Mar 05, 2007

SENTENCE JAIL

Based on the defendant's conviction of CRIMINAL MISCHIEF - INTENTIONAL DAMAGE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

Based on the defendant's conviction of MANUFACTURE/POSSESS BURGLARY TOOLS a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

SENTENCE FINE

Charge # 2
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 3
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 4
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 5
Fine: $2500.00
Suspended: $0.00
Surcharge: $2150.00
Due: $4650.00

Case No: 061100748
Date: Mar 05, 2007

Charge # 7
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 8
Fine: $1000.00
Suspended: $0.00
Surcharge: $875.00
Due: $1875.00

Charge # 9
Fine: $5000.00
Suspended: $0.00
Surcharge: $4275.00
Due: $9275.00

Charge # 10
Fine: $1000.00
Suspended: $0.00
Surcharge: $875.00
Due: $1875.00

Total Fine: $29500
Total Suspended: $0
Total Surcharge: $25275
Total Principal Due: $54775
Plus Interest

Pay fine to The Court.

Dated this 12 day of February, 2008.

GORDON J LOW / Timothy Hanson
District Court Judge

Addendum G

Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,
Tampa Division.
Steve BOWIE-MYLES,
v.
UNITED STATES of America.
Nos. 8:03-CR-437-T-17MAP, 8:06-CV-1161-T-17MAP.

July 26, 2006.

Steve Bowie-Myles, Petersburg, VA, pro se.

Arthur Lee Bentley, III, U.S. Attorney's Office, Tampa, FL, for United States of America.

ORDER

ELIZABETH A. KOVACHEVICH, District Judge.

***1** This cause is before the Court upon Defendant's motion to vacate, set aside, or correct an allegedly illegal sentence pursuant to 28 U .S.C. § 2255 (Doc. cv-1; cr-158).

BACKGROUND

On October 23, 2003, a grand jury in the Middle District of Florida returned a two count indictment charging Defendant Bowie-Myles with: (a) possessing with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, while on board a vessel subject to the jurisdiction of the United States, in violation of 46 App. U.S.C. §§ 1903(a) and 1903(g); 21 U.S.C. § 960(b)(1)(B)(ii); and 18 U.S.C. § 2 (Count One); and (b) conspiring to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, while on board a vessel subject to the jurisdiction of the United States, in violation of 46 App. U.S.C. §§ 1903(a), 1 of 112 1903(j), and 1903(g); and 21 U.S.C. § 960(b)(1)(B)(ii) (Count Two).[FN1]

FN1. The Indictment was sealed for reasons unrelated to the charges against Bowie-Myles. A First superseding Indictment was returned on November 6, 2003. D-cr-27. As it relates to Defendant Bowie-Myles, the First Superseding Indictment was identical to the original Indictment. However, Defendant Bowie-Myles entered a plea of guilty to-and was convicted on the charge contained in-Count One of the original Indictment (rather than to Count One of the First Superseding Indictment). D-cr-50; D-cr-54; D-cr-74; D-cr-82; D-cr-86; D-cr-148. At the time of sentencing, the First Superseding Indictment was dismissed pursuant to a motion by the Government. D-cr-82; D-cr-86. Therefore, the First Superseding Indictment will not be discussed further herein.

On January 7, 2004, pursuant to a written plea agreement, D-cr-50, Defendant Bowie-Myles entered a plea of guilty to Count One of the Indictment. D-cr-54. The written plea agreement and the Rule 11 plea colloquy clearly established that Defendant Bowie-Myles was pleading guilty to possessing with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, while on board a vessel subject to the jurisdiction of the United States, in violation of 46 App. U.S.C. §§ 1903(a) and 1903(g); and 21 U.S.C. § 960(b)(1)(B)(ii). D-cr-50; D-cr-54.

On May 14, 2004, the Court sentenced Defendant Bowie-Myles for his conviction on the charge contained in Count One of the Indictment. D-cr-82. Defendant Bowie-Myles was sentenced to a term of imprisonment of 168 months, a term of supervised release of five (5) years, and a special assessment of $100. D-cr-82; D-cr-86.

On May 17, 2004, the criminal judgment was filed. D-cr-86. The criminal judgment correctly stated Defendant Bowie's sentence. The criminal judgment also correctly stated that Defendant Bowie Myles was convicted of Count One of the Indictment, and correctly cited the operative provisions of the United States Code, The criminal judgment also contained a citation to 46 App. U.S.C. § 1903(j). This additional citation was incorrect, but it was merely surplusage. 3 "46:USC:1903(a)(g)." However, in setting forth the nature of the offense, the criminal judgment incorrectly stated that Defendant Bowie-Myles was convicted of "Conspiracy to Possess with Intent to Distribute 5 Kilograms or More of Cocaine."D-cr-86.

On May 27, 2004, Defendant Bowie-Myles filed a timely notice of appeal. D-cr-91. Defendant's appeal to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") was assigned case number 04-12743-D.

***2** On August 25, 2004, the Eleventh Circuit entered a per curiam order dismissing the appeal with prejudice. D-cr-118. The order of dismissal was issued as the mandate of the Eleventh Circuit. D-cr-118. Defendant Bowie-Myles did not file a petition for writ of certiorari seeking review in the Supreme Court. D-cv-1 at 2.

On June 20, 2005, the Court, acting sua sponte, entered a First Amended Judgment in a Criminal Case, D-cr-148, which corrected the clerical (or scrivener's) error contained in the initial criminal judgment. See Paragraph 4, above. The First Amended Judgment correctly described the nature of offense as "Possession with Intent to Distribute Five Kilograms or More of Cocaine."D-cr-148. There was no change in the sentence imposed.

On June 22, 2006, Defendant Bowie-Myles filed the instant Section 2255 motion. D-cv-1. The Section 2255 motion was signed and dated by Defendant Bowie-Myles on June 16, 2006. D-cv-1 at 17. On June 27, 2006, the Court entered an order directing, among other things that the Government file "an abbreviated response addressing the issue of whether the motion to vacate is timely under the AEDPA."D-cv-2.

MOTION TO VACATE IS UNTIMELY

Section 2255 provides that a motion to vacate, set aside, or correct sentence must be filed within one year of the time a judgment of conviction becomes "final." See 28 U.S.C. § 2255 ¶ 6(1). When a defendant appeals, but does not seek certiorari review in the Supreme Court, his conviction becomes "final" when the 90-day period for seeking certiorari review expires. *See Clay v. United States*, 537 U.S. 522, 525 (2003)("For purposes of starting the clock on § 2255's one-year limitation period, ... a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction."); *see also Close v. United States*, 336 F.3d 1283, 1285 (11th Cir.2003) (same); *Kaufman v. United States*, 282 F.3d 1336, 1339 (11th Cir.2002)(same).

The Supreme Court's Rules make clear that the 90-day period for filing a petition for writ of certiorari runs from the time that a judgment is entered by the Court of Appeals. S.Ct. R. 13(3). As explained above, in this case, the Eleventh Circuit entered its judgment dismissing Defendant Bowie-Myles' appeal on August 25, 2004. The time for filing a petition for a writ of certiorari expired 90 days later, on November 23, 2004. This is the date on which Defendant's judgment became "final," within the meaning of 28 U.S.C. § 2255 ¶ 6(1), and the one-year limitation period began to run. Therefore, Defendant's Section 2255 motion would be timely only if it were filed on or before November 23, 2005, which is the date that he signed it.

As explained above, Defendant Bowie-Myles filed the instant Section 2255 motion with the Court on June 22, 2006. However, the Eleventh Circuit has held that a prisoner's pro se Section 2255 motion is deemed "filed" on the date that it is delivered to prison authorities for mailing. *See Adams v. United States*, 173 F.3d 1339, 1340-41 (11th Cir.1999); *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir.2001). The Eleventh Circuit has further has held that absent evidence to the contrary, it is to be assumed that a Section 2255 Defendant's motion was delivered to prison authorities on the date that he signed it. *Washington*, 243 F.3d at 1301.

***3** Defendant Bowie-Myles' Section 2255 motion is deemed to have been "filed" on June 16, 2006, which is the date that he signed it. As explained above, the

one year limitation period expired on November 23, 2005. Therefore, Defendant Bowie-Myles' Section 2255 motion is almost seven months out of time.

The Entry of the Amended Judgment Did Not Restart Section 2255's One-Year Limitation Period

The Court, acting sua sponte, entered an amended judgment on June 20, 2005. The change in the judgment, however, was merely clerical in nature; it did nothing more than correct a scrivener's error. As explained above, the Court amended the judgment by changing the description of the offense of conviction. The change in the judgment was insignificant and did not affect-adversely or otherwise-any of Defendant Bowie-Myles' substantial rights. As explained above, the original judgment correctly stated that Defendant Bowie-Myles had been convicted of Count One of the Indictment, and the operative statutory provisions were properly cited therein. Most importantly, the sentence imposed by the Court was correctly set forth in the original judgment. The brief (13-word) description of the offense of conviction, under the heading "NATURE OF OFFENSE," admittedly was wrong. However, if the first two words of the description, "conspiracy to," had been omitted, the original judgment would have been correct and an amendment would not have been necessary.

The deletion of the words "conspiracy to" in the amended judgment was a simple clerical change correcting a scrivener's error. Rule 36, Federal Rules of Criminal Procedure, provides that "the court may at any time correct a clerical error in a judgment ... arising from oversight or omission."The Eleventh Circuit repeatedly has held that the correction of the offense of conviction in a criminal judgment is clerical in nature. *See, e.g., United States v. Diaz,* 190 F.3d 1247, 1253 (11th Cir.1999)("the judgment reflects the incorrect offense, ... which we regard as simply a clerical error"); *United States v. De La Rosa-Hernandez,* 157 Fed. Appx. 219 (11th Cir.2005)(unpublished)(fact that judgment incorrectly references count of conviction as possession-instead of conspiracy to possess-is a "clerical error"). Indeed, in addressing a judgment that incorrectly referenced a crime entirely unrelated to the offense of conviction (and cited a statutory subsection that did not exist), the Eleventh Circuit held:

> The judgment entered in this case indicates that [the defendant] was convicted of "18 U.S.C. § 911(g) Possession of a Firearm by a Convicted Felon."The section reference is a *scrivener's error.*Section 911 involves the crime of falsely impersonating a federal officer or employee, and that statutory provision has no subsections. [The defendant] was actually indicted for, pleaded guilty to, and was convicted of, violating 18 U.S.C. § 922(g), which is the provision prohibiting the possession of a firearm by a convicted felon.... The judgment should be amended accordingly....
>
> ***4** *United States v. Wimbush,* 103 F.3d 968, 970 (11th Cir.1997)(emphasis added). The Eleventh Circuit further has held that when the district court corrects an error in a criminal judgment pursuant to Rule 36, Federal Rules of Criminal Procedure, the right to appeal the judgment does not begin anew. In *United States v. Portillo,* 363 F.3d 1161 (11th Cir.2004), the district court corrected a clerical error in the restitution provision of a criminal judgment. Thereafter, the defendant appealed the restitution portion of the amended judgment.
>
> The Eleventh Circuit held that the appeal was untimely, pursuant to Rule 4(b)(1)(A), Federal Rules of Appellate Procedure, because the defendant should have appealed the restitution order in the original judgment (which he did not do). The correction of the clerical error did not provide the defendant with a second opportunity to appeal the judgment. *Id.* at 1166.

Although there does not appear to be an Eleventh Circuit case squarely addressing whether the correction of a clerical error with an amended judgment restarts the one-year limitation provision of Section 2255 ¶ 6(1), the logic of *Portillo* clearly indicates that it does not. After all, the Supreme Court has held that a judgment of conviction becomes "final," for purposes of Section 2255, when the defendant's opportunity for direct appeal of his conviction has been exhausted. *See Clay v. United States,* 537 U .S. 522, 527-28 (2003).

Furthermore, the other courts that have addressed this narrow issue appear to have held uniformly that when a case is remanded for a ministerial reason or for the correction of a clerical error (or when the district court sua sponte corrects a clerical error in a judg-

ment), the one-year limitation period of Section 2255 does not begin anew when the district court corrects performs the ministerial directive of the appellate court or corrects the clerical error. *See United States v. Wilson*, 256 F.3d 217, 219-20 (4th Cir.2001)(Section 2255 limitation period not restarted when the district court performs the ministerial task of vacating one count on remand); *United States v. Dodson*, 291 F.3d 268, 275 (4th Cir.2002)(Section 2255 limitation period does not begin anew when "appellate court ... remands for a ministerial purpose that could not result in a valid second appeal"); *United States v. Greer*, 79 Appx. 974 (9th Cir.2003)(unpublished)(a district court's sua sponte amendment of a judgment, which did not make any change to the legally operative sentence, did not restart Section 2255's limitation period); *United States v. Hayes*, 2006 WL 851184 (E.D.La. March 13, 2006)("remand for ministerial purposes does not toll the period for filing a habeas petition because the defendant would have no legitimate grounds for direct appeal of the district court's" amended judgment); *see also Richardson v. Bramley*, 998 F.2d 463, 465 (7th Cir.1993)("[a] judgment is not final if the appellate court has remanded the case to the lower court for further proceedings, unless the remand is for a purely "ministerial" purpose")(emphasis added).

***5** In sum, the Court's sua sponte amendment to the judgment, which did nothing more than correct a clerical or scrivener's error, did not restart Section 2255's one-year limitation period. Therefore, as explained above, Defendant Bowie-Myles' conviction became "final," for purposes of Section 2255, on November 23, 2004, when the 90-day period for filing a petition for writ of certiorari expired. Pursuant to Section 2255 ¶ 6(1), Defendant Bowie-Myles had until November 23, 2005, to file a Section 2255 motion. The instant motion, "filed" (under the Eleventh Circuit's mailbox rule) on June 16, 2006, was almost seven months out of time.

Defendant has not demonstrated that extraordinary circumstances entitle him to equitable tolling.

Accordingly, the Court orders:

That Defendant Bowie-Myles' motion to vacate (Doc. cv-1; cr-158) is denied, with prejudice. The Clerk is directed to enter judgment against Bowie-Myles in the civil case and to close that case.

IT IS FURTHER ORDERED that defendant is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA).*Id.*"A [COA] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."*Id* . at § 2253(c)(2). To make such a showing, defendant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,' " *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Defendant has not made the requisite showing in these circumstances.

Finally, because Defendant is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

ORDERED at Tampa, Florida, on July 26, 2006.

M.D.Fla.,2006.
Bowie-Myles v. U.S.
Not Reported in F.Supp.2d, 2006 WL 2092286 (M.D.Fla.)

END OF DOCUMENT

Addendum H

U.S. Department of Justice
United States Marshals Service

DETAINER

BASED ON VIOLATION OF PROBATION AND/OR SUPERVISED RELEASE

UNITED STATES MARSHAL

_____ DISTRICT OF UTAH

Please type or print neatly:

TO: CACHE COUNTY JAIL
ATTN: BOOKING/DETAINERS
1225 W VALLEY VIEW, STE #100
LOGAN, UT 84321

DATE: SEPTEMBER 7, 2006
SUBJECT: SWENSON, KENDALL ROSSEL
AKA:
DOB/SSN: 03/28/63
USMS #: 07002-081
CR #: 2:03CR135PGC

Please accept this Detainer against the above-named subject who is currently in your custody. The United States District Court for the _____ District of UTAH _____ has issued an arrest warrant charging the subject with violation of the conditions of probation and/or supervised release.

Prior to the subject's release from your custody, please notify this office at once so that we may assume custody if necessary. If the subject is transferred from your custody to another detention facility, we request that you forward our Detainer to said facility at the time of transfer and advise this office as soon as possible.

The notice and speedy trial requirements of the Interstate Agreement on Detainers Act do NOT apply to this Detainer, which is based on a **Federal probation/supervised release violation warrant.**

Please acknowledge receipt of this Detainer. In addition, please provide one copy of the Detainer to the subject and return one copy of the Detainer to this office in the enclosed self-addressed envelope.

Very truly yours,

RANDALL D. ANDERSON
United States Marshal

BY: LAURA JOHNSON
INVESTIGATIVE RESEARCH SPEC
(801)524-3404
(801)524-5134 FAX

RECEIPT

Date: 9-13-06

Signed:

By:

Title: CCSO SGT

Prisoner

PRIOR EDITIONS ARE OBSOLETE AND NOT TO BE USED

Form USM-16d
Est 11/98

Addendum I

Court of Appeals of Texas, Houston (1st Dist.).
Michael Lawrence WATSON, Appellant,
v.
The STATE of Texas, Appellee.
No. 01-97-00526-CR.

Jan. 21, 1999.

On Appeal from the 177th District Court, Harris County, Texas, Trial Court Cause No. 737004.

Panel consists of Chief Justice SCHNEIDER and Justices NUCHIA and HOLLINGSWORTH.

OPINION

HOLLINGSWORTH.[FN1]

FN1. The Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, participating by assignment.

*1 The appellant waived his right to a jury trial, entered a plea of not guilty to the felony offense of possession of cocaine, and was tried before the court. The court found him guilty as charged, enhanced with two prior felony convictions, and assessed punishment at confinement for ten years in prison. At issue is the legality of the warrantless search and the sufficiency of evidence to support the conviction.

TESTIMONY

On November 5, 1996, Officer Calvin Johnson went to the Fantasy Motel Inn with several other officers to serve a grand jury subpoena on the appellant. The officers were members of the "Achilles Group" which focuses on three-time, violent offenders and investigates felons that are armed or dealing in guns. The Achilles Group was investigating the appellant in connection with a case involving illegal possession of firearms.

The officers asked the manager if the appellant was at the motel. The manager told them that the appellant was in room 105 and gave them a receipt which showed that appellant had rented room 105. The officers knocked on the door to room 105 and announced that they were Houston police officers. They knocked several times and waited several minutes. During that time, the officers could hear male and female voices whispering and they could hear someone moving around the room. A woman peered through the window coverings and asked them what they wanted. They repeated that they were police officers and told her they needed to talk to the appellant. She told them to wait while she dressed.

Two more minutes passed before the woman opened the door. She stepped outside the door and told them the appellant was in the bathroom. Officer Johnson testified that he smelled a strong odor of burning marijuana as soon as the woman opened the door. He heard the sound of the toilet flushing, and he could hear water running in the sink. The officers called for the appellant several times. The appellant came out of the bathroom with his hands over his head and lowered himself to the ground. The officers entered the room to secure it and to be certain there were no other people in the room and no weapons within the appellant's reach.

Officer Johnson testified that near the bathroom he smelled fresh marijuana. He looked in the bathroom

and saw a green, leafy substance swirling around in the toilet bowl which he recognized as marijuana. The water was still running in the sink. He turned off the water and, with the aid of his flashlight, saw a glass vial in the drain hole which he recognized as a "crack pipe." The officers dismantled a portion of the plumbing associated with the sink to retrieve the pipe. A white, powdery substance found in the pipe proved to be cocaine.

MOTION TO SUPPRESS

In his first three points of error, the appellant complains of the denial of his motion to suppress evidence found in his motel room after a warrantless search. The appellant argues that there were no exigent circumstances justifying the officers' search of the motel room. He alternatively argues that even if there were exigent circumstances, the search was nevertheless invalid because the officers should have terminated the search once the appellant and the premises were secured.

Standard of Review

***2** At a suppression hearing, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. Romero v. State, 800 S.W.2d 539, 543 (Tex.Crim.App.1990). Absent an abuse of discretion, the trial court's findings should not be disturbed. Covarrubia v. State, 902 S.W.2d 549, 553 (Tex.App.-Houston [1st Dist] 1995, pet. ref'd). We do not engage in our own factual review. Instead, viewing the evidence in the light most favorable to the trial court's ruling, we consider only whether the trial court improperly applied the law to the facts. Romero, 800 S.W.2d at 543; Covarrubia, 902 S.W.2d at 553.

The trial court found that the search of the appellant's motel room was justified because the officers had probable cause to believe the room contained evidence of a crime, and exigent circumstances existed which made it impractical to obtain a warrant.

Warrantless Search

The officers conducted a search when they entered the motel room without the consent of the appellant. Taylor v. State, 945 S.W.2d 295, 298 n. 1 (Tex.App.-Houston [1st Dist.] 1997, pet. ref'd) (a motel room is the equivalent of a home in the context of search and seizure law). To justify a warrantless search, the State must demonstrate probable cause existed at the time the search was made, and the existence of exigent circumstances which made the procuring of a warrant impracticable. TEX.CODE CRIM. P. ANN. art. 14.05 (Vernon Supp.1999).

Probable Cause

Probable cause to search exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a person of reasonable prudence to believe that the instrumentality of a crime or evidence of a crime will be found. McNairy v. State, 835 S.W.2d 101, 106 (Tex.Crim.App.1991). In *McNairy,* the Court of Criminal Appeals concluded that the police had probable cause to conduct a warrantless search of defendant's mobile home where the police had detected the odor of methamphetamine emanating from the home, they had heard the back door of the home opening and people running out the back, and they knew there was another methamphetamine laboratory nearby. McNairy, 835 S.W.2d at 106. The odor of marijuana can supply probable cause for a warrantless arrest. Isam v. State, 582 S.W.2d 441, 444 (Tex.Crim.App.1979); Jackson v. State, 745 S.W.2d 394, 396 (Tex.App.-Houston [1st Dist.] 1987, pet. ref'd).

Here, Officer Johnson testified that he detected a strong odor of burning marijuana as soon as the woman opened the motel door. Both officers testified that there was an odor of marijuana on or about her person. Officer Johnson heard the appellant flushing the toilet and running the water in the sink and believed that the appellant may have been destroying contraband. Based on these facts, the officers had probable cause to enter the motel room.

Exigent Circumstances

***3** The officers were justified in entering the motel room without consent or a search warrant because they had probable cause to believe marijuana was in the room. Exigent circumstances are present where an officer perceives a danger to himself or others, a danger that the suspect will escape, or a danger that evidence will be destroyed. McNairy, 835 S.W.2d at

107. The officers could not determine whether a third person was in the room or in the bathroom. Two officers testified that the appellant was under investigation for the illegal possession of a firearm, that he was a three-time felon, having been convicted of violent crimes, and that he had been arrested for attempted murder. The officers heard the appellant running water and flushing the toilet in the bathroom. Combined with the odor of the marijuana, the delay in opening the door, and the fact that the officers heard the appellant and his female companion moving around and whispering, the sound of the running water and flushing toilet gave the officers reason to believe that evidence was being destroyed. The record supports a finding that a warrantless search of the motel room was justified by exigent circumstances.

Protective Search

The seizure of the crack pipe and the marijuana was permissible because the evidence was found in plain view during a legitimate protective sweep pursuant to a lawful investigative detention. A police officer in circumstances short of probable cause for arrest may justify temporary detention for the purpose of investigation which is a lesser intrusion upon personal security than arrest. *Ramirez v. State*, 672 S.W.2d 480, 482 (Tex.Crim.App.1984). A temporary detention is justified when the detaining officer has specific articulable facts, which taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity. *Woods v. State*, 956 S.W.2d 33, 38 (Tex.Crim.App.1997).

The smell of burning marijuana justifies further investigation to determine whether an offense is being committed in an officer's presence. *Jackson*, 745 S.W.2d at 395. The police were justified in detaining the appellant and his companion on the basis of the odor of burning marijuana in the room.

Officer Johnson testified he had reason to believe that the appellant may have been in possession of weapons because that was the reason for the investigation. An officer may conduct a limited search when an officer has a reasonable belief, based on specific and articulable facts, that a suspect is dangerous and may gain immediate control of weapons. *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3480-81, 77 L.Ed.2d 1201 (1983); *Watson v. State*, 861 S.W.2d 410 (Tex.App.-Beaumont 1993, pet. ref'd). A protective search for weapons may extend beyond the person even in the absence of probable cause. *Id.*

***4** An officer may seize what he sees in plain view if he is legally permitted to be at the place from which the evidence is visible. *Miller v. State*, 608 S.W.2d 684, 685 (Tex.Crim.App.1980). Under the "plain view" doctrine, a warrantless seizure by police of private possessions is permitted when: (1) the police officer lawfully makes the initial intrusion, and (2) it is immediately apparent to the police officer that the items he observes may be evidence of a crime, contraband, or otherwise subject to seizure. *Green v. State*, 866 S.W.2d 701, 704 (Tex.App.-Houston [1st Dist.] 1993, no pet.).

Officer Johnson lawfully looked into the bathroom pursuant to a protective search following an investigative detention. He smelled an odor of fresh marijuana and saw marijuana swirling in the toilet bowl. Turning off the water, Officer Johnson looked down the drain in the sink where he saw a crack pipe in the drain in plain view.

The trial court did not abuse its discretion in overruling the motion to suppress. The appellant's first three points of error are overruled.

SUFFICIENCY OF THE EVIDENCE

In his fourth and fifth points of error, the appellant challenges the sufficiency of the evidence to support his conviction.

Standard of Review

The standard of review for legal sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex.Crim.App.1996) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The appellate court does not review the fact finder's weighing of the evidence. *Clewis*, 922 S.W.2d at 134. In reviewing the factual sufficiency of the evidence, the court of appeals should not substitute its judgment for that of the fact

finder and should set aside the judgment only if it is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 129, 133.

Affirmative Link to Controlled Substance

The appellant argues that the evidence was legally insufficient because he was not "affirmatively linked" to the cocaine. To support a conviction for the felony offense of possession of a controlled substance, the State had the burden to prove the appellant knowingly or intentionally possessed a controlled substance. That is, that the appellant exercised care, control, or management over the cocaine, and that the appellant knew that what he was carrying was contraband. *Hurtado v. State*, 881 S.W.2d 738, 743 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd); *see*TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.115(a) (Vernon Supp.1999). Circumstantial evidence is sufficient if the combined and cumulative effect of all incriminating circumstances point to the defendant's guilt. *Sosa v. State*, 845 S.W.2d 479, 483 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd). Evidence which affirmatively links the appellant to the contraband in such a manner that a reasonable inference arises that he knew of its existence and whereabouts is sufficient. *Palmer v. State*, 857 S.W.2d 898, 900 (Tex.App.-Houston [1st Dist.] 1993, no pet.).

***5** In determining if sufficient affirmative links exist, a reviewing court can examine such circumstantial factors as the amount of contraband found, its location in relationship to the defendant's personal belongings, the defendant's relationship to other persons with access to the premises, incriminating statements, and proximity of the defendant to the contraband. *Villegas v. State*, 871 S.W.2d 894, 896 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). Other facts to consider include: 1) whether the defendant was at the place searched at the time of the search; 2) whether there were other persons present at the time of the search; 3) whether the contraband was found in a closet that contained men's clothing, if the defendant is male; 4) whether the amount of contraband found was large enough to indicate the defendant knew of its existence; and 5) whether there is evidence establishing the defendant's occupancy of the premises. *Classe v. State*, 840 S.W.2d 10, 12 (Tex.App.-Houston [1st Dist.] 1992, pet. ref'd).

Here, the appellant rented the motel room in his name. He had convenient access to the contraband, the appellant was in the bathroom when his female companion opened the door. The contraband was in plain view, swirling in the toilet bowl and suspended in the plumbing of the sink. The fact that the water was still swirling in the toilet bowl and the water in the sink was still running indicated that the appellant was the person who put the contraband in those places. Drug paraphernalia was in plain view, sitting on the dresser in the motel room. The motel room and the bathroom had a strong residual odor of marijuana, both burnt and fresh. The appellant came out of the bathroom with his hands raised and lowered himself to the floor before the officers even asked him to do so, indicating a consciousness of guilt.

The evidence was legally sufficient to support a finding that the appellant intentionally and knowingly possessed the cocaine. The finding of guilt based on the evidence is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The appellant's fourth and fifth points of error are overruled.

The judgment is affirmed.

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